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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. DAVID VELASQUEZ, Defendant and Appellant.	B262495 (Los Angeles County Super. Ct. No. KA024463)

APPEAL from an order of the Superior Court of Los Angeles County, William C. Ryan, Judge. Affirmed.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Noah P. Hill, Deputy Attorneys General, for Plaintiff and Respondent.

Petitioner David Velasquez is currently serving a "Three Strikes" sentence of 27 years to life in prison. After passage of Proposition 36, the Three Strikes Reform Act of 2012 (Proposition 36 or the Reform Act), Velasquez petitioned for recall of sentence and resentencing pursuant to Penal Code section 1170.126.[1] The trial court denied the petition on the ground resentencing would pose an unreasonable risk of danger to public safety. Velasquez contends the trial court should have retroactively applied the definition of unreasonable risk of danger to public safety contained in section 1170.18, and abused its discretion in denying the petition. Discerning no error or abuse of discretion, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Velasquez's commitment offense*

In 1995, a jury convicted Velasquez of second degree burglary (§ 459) and petty theft with priors (§ 666) based on the following incidents. In September 1994, Velasquez attempted to steal a bicycle from a Pomona home after using a crowbar to break into the garage's side door. One of the homeowner's neighbors saw Velasquez exiting with the bike and " 'tussled' " with him. Velasquez let go and began to walk away. The neighbor followed. Noticing the crowbar in Velasquez's hand, the neighbor grabbed for it and again tussled with Velasquez. After the neighbor and Velasquez exchanged words, Velasquez left. Later that morning, Velasquez was caught shoplifting cold medication from a drugstore. The trial court found Velasquez had suffered five prior "strike" convictions (§ 667, subds. (b)-(i)),

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[1] All further undesignated statutory references are to the Penal Code.

and had served a prior prison term within the meaning of section 667.5, subdivision (b). It imposed a sentence of 25 years to life pursuant to the Three Strikes law, and two section 667.5, subdivision (b) enhancements. We modified Velasquez's sentence by ordering one of the section 667.5, subdivision (b) enhancements stricken, and otherwise affirmed the judgment in an unpublished opinion.[2] (*People v. Velasquez* (May 30, 1997, B099855 [nonpub. opn.].)

2. *Velasquez's section 1170.126 petition and hearing*

On March 12, 2013, after passage of the Reform Act, Velasquez filed a petition for recall of sentence in the trial court pursuant to section 1170.126. The People opposed the petition, contending Velasquez was unsuitable for resentencing because his release would pose an unreasonable risk of danger to public safety.[3] On September 17, 2014, the trial court held a hearing on the petition. (§ 1170.126, subd. (f).) Velasquez was present and represented by counsel. The following evidence was adduced at the hearing.

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[2] We take judicial notice of our unpublished opinion, and derive the factual summary of the commitment offense therefrom. (Evid. Code, §§ 459, subd. (a), 452, subd. (d).)

[3] The People initially argued Velasquez was ineligible because he had been armed with the crowbar during the burglary. They subsequently withdrew their opposition on this ground and opposed resentencing on the ground of unsuitability only.

a. *Criminal history*

Velasquez's juvenile history began when he was 15 years old. As a juvenile, he had sustained petitions for robbery and receiving stolen property, and numerous arrests, including battery, assault with a deadly weapon, and grand theft. As an adult, Velasquez was convicted of multiple offenses including second degree burglary in 1985 and five residential burglaries in 1989; being under the influence of a controlled substance in 1986, 1987, 1989, and 1994; the sale, transport, or offer to sell a controlled substance in 1986 (Health & Saf. Code, § 11352); and assault on a peace officer or emergency personnel.

Before being incarcerated, Velasquez was addicted to heroin. He dropped out of school after the 11th grade. He joined a Pomona street gang at the age of 17 and remained a member of that gang throughout the 1990's.

In 2001, while incarcerated, Velasquez was convicted of the possession or manufacture of a weapon, a five and one-half inch long piece of metal, sharpened at one end, with a cloth handle. (§ 4502, subd. (a).)

b. *Prison disciplinary history*

During his current term of imprisonment, Velasquez has been found guilty of 12 serious rule violations (CDC 115s) and has amassed 10 counseling chronos (CDC 128As).[4] In addition to the possession of a weapon charge discussed *ante,* Velasquez was found guilty of willfully delaying a peace officer by engaging in a hunger strike in 2011; possession or manufacture of a weapon in 2008; misuse of state property in 2005; being out of bounds, mutual combat, engaging in behavior that could jeopardize institutional security, disobeying a direct order, and possession of contraband (balloons), all in 2004; possession of a tattoo gun in 2003; violation of cell standards in 2002; and disruptive behavior in 2000. In the 2008 incident, Velasquez was found with four cone-shaped objects made from wrapped paper, with sharpened metal tips, with string attached. Velasquez claimed he was making needles to repair his clothing. The prison hearing officer found the items could be used as blow darts or stabbing instruments.

Velasquez's 10 custodial counseling chronos included counseling for disobeying direct orders and delaying lock up. The majority of the counseling chronos occurred between 2000 and 2005.

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[4] A "CDC 115" refers to a California Department of Corrections (CDC) rules violation report that documents misconduct that is believed to be a violation of law or is not minor in nature. (*In re Roderick* (2007) 154 Cal.App.4th 242, 249, fn. 3; Cal. Code Regs., tit. 15, § 3312, subd. (a)(3).) A "Custodial Counseling Chrono" (CDC Form 128-A) documents minor misconduct and counseling provided for it. (*In re Roderick, supra*, at p. 269, fn. 23; Cal. Code Regs., tit. 15, § 3312, subd. (a)(2).)

In 2006, Velasquez was validated by the California Department of Corrections and Rehabilitation (CDCR) as an associate of the Mexican Mafia and was placed in the secure housing unit (SHU) at Pelican Bay State Prison. Velasquez denied being a Mexican Mafia associate. In 2013, the CDCR validated him as inactive in the gang.

c. *Prison programming*

While incarcerated, Velasquez participated in a long distance learning program offered by Cornell University, the "Prisoner Express program"; a "Way to Happiness" course offered by Criminon; the "Pelican Bay Speaks" project; and a Christian pen pal program.

d. *Opinion of Dr. Hy Malinek*

Dr. Hy Malinek, a clinical psychologist, was appointed as an expert and conducted a comprehensive evaluation and risk assessment of Velasquez. Velasquez's IQ placed him in the upper segment of the low average intelligence range. He did not suffer from any recognized psychiatric disturbance or personality disorder. Velasquez admitted responsibility for his past criminal conduct, emphasized that he was no longer a gang member or drug addict, and appeared motivated to abstain from similar conduct in the future. Velasquez's opioid abuse was in remission in the controlled environment of prison.

Malinek's evaluation indicated Velasquez scored 11 of a maximum 28 in the Violence Risk Assessment Guide, indicating a moderate recidivism risk, or a 58 percent recidivism risk in 10 years. On the Static-99R, an actuarial measure of relative risk, Velasquez scored a four, placing him in the moderate-high risk category for being charged with or convicted of a violent offense. He scored a 24 on the Level of Service/Case Management

Inventory survey (LS/CMI), placing him at a high risk for general criminal recidivism. The LS/CMI score indicated a 45 percent likelihood Velasquez would be incarcerated for a new offense within one year of release. His risk for future violence was between 30 and 60 percent, depending on the number of years into the future assessed. Based on administration of another test, the HCR-20, Malinek opined: "many of the risk factors which have been associated with violence were most prevalent in Mr. Velasquez's past. While he had a history of violent behavior and a significant drug addiction in the past, his performance and adjustment in custody has been 'better' than that of many individuals at CDCR after nearly two decades of incarceration. It appears he has taken time to improve his skills and, importantly, he has not been violent in custody. He shows some insight into the historical origins and contributors of his conduct. His release plans seem reasonable and he apparently has a small support system that, if consistently available, can help further in diminishing the risk of violent recidivism. However, it is uncertain at this time how he will function in the community when faced with the stressors of being under supervision."

Malinek concluded Velazquez's current risk of violence was moderate. He summarized: "Mr. Velasquez's scores on a variety of actuarial measures designate the violence risk in a range of recidivism rates between moderate and high. . . . However, his recent conduct and future plans suggest no more than a moderate risk." Velasquez's "number one risk factor" "remain[ed] his history of drug use. Unfortunately, he has never completed a substance abuse treatment program and has yet to participate in one during the past 18 years of prison. Should he be able to

continue to refrain from substance use, the likelihood of successful reintegration into the community is much improved."

e. *Opinion of Richard Subia*

Richard Subia, a retired Director of Corrections who had been employed by the CDCR in various capacities for over 26 years, was appointed as an expert in corrections, rehabilitation and gang culture. He testified at the hearing and prepared a written report. Because Velasquez was a member of a Southern Hispanic street gang before his incarceration, upon arrival in prison, unofficial prison politics would have required him to follow the Mexican Mafia's rules. Velasquez likely had no choice but to associate with the prison gang for his own safety, and there was no record showing he engaged in criminal activity on the gang's behalf. As noted, a routine review conducted in 2013 determined Velasquez was no longer an active Mexican Mafia associate.[5] Given Velasquez's age (49), he was unlikely to return to a gang if released. According to Subia, most of Velasquez's prison disciplinary incidents were unremarkable and insignificant. There was no showing Velasquez had ever attempted to use a weapon against anyone while incarcerated. Subia provided explanations for the 2001, 2004, and 2008 incidents.[6]

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[5] Debriefing, a process by which an inmate can disassociate from the Mexican Mafia, places the inmate and his family in danger. Velasquez did not "debrief" but spent six years in the SHU before his gang affiliation was reevaluated as a matter of course.

[6] The sharp objects Velasquez was convicted of making in 2008 were inconsistent with inmate-made weapons used as blow darts or spears. Subia credited Velasquez's story that the items

After Velasquez was sent to the SHU, there were no educational or rehabilitative programs other than correspondence courses available to him. After he was transferred to another facility, and at the time of the resentencing hearing, Velasquez was involved in a GED (General Education Development) preparation program and was on the waiting list for Alcoholics Anonymous (AA) and Narcotics Anonymous (NA). The CDCR had "provided very little opportunity in the form of substance abuse treatment" for Velasquez during his incarceration. Velasquez "underst[ood] the need for continued support through a 12-step program."

Subia opined that Velasquez currently posed a risk of danger if released, but that risk was not unreasonable. Velasquez's criminal and gang history meant that he might have difficulty finding a job and housing. Subia explained: "That in itself means that he would be a risk. But is that risk unreasonable? In my opinion, it's not."

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were used as sewing needles because Velasquez's pants were hemmed with crude string stitches. In the 2004 incident in which Velasquez was disciplined for jeopardizing security, he had refused to follow a guard's order and, when handcuffed, yelled to other inmates, " 'You saw what happened. You know what time it is.' " In Subia's view, Velasquez's comment was not necessarily a suggestion to other inmates that they assault staff. Subia explained that the 2001 weapon possession was likely related to conditions at Calipatria State Prison. At the time there was gang violence between different inmate groups and Velasquez explained he had the weapon for his own protection.

f. *Parole plans*

Velasquez presented a letter from Behavioral Systems Southwest, Hollywood Parolee Service Center (BSS). The letter stated BSS would be able to provide Velasquez with post-release transitional services, including room, board, and life skills training.

Malinek's report stated that Velasquez's sister would initially provide food and shelter upon his release. Velasquez eventually wished to move to Indiana to pursue a relationship with a woman with whom he had been corresponding.

g. *The trial court's ruling*

On October 21, 2014, the trial court denied the petition in a 13-page written ruling. The court recognized that immutable factors such as Velasquez's criminal history and prison disciplinary record could not forever support an unsuitability finding; over time and in the face of rehabilitative programming immutable factors were decreasingly predictive of current dangerousness. "Standing alone," Velasquez's disciplinary history did not convince the court he was unsuitable. However, Velasquez's serious misconduct while in prison, considered along with his significant criminal history, psychological testing results, lack of rehabilitative programming, and weak post-release plans demonstrated he currently posed an unreasonable risk of danger to public safety.

3. *Appeal*

Velasquez filed an untimely notice of appeal. On April 2, 2015, we granted his application for relief from default and request for constructive filing of a notice of appeal.

DISCUSSION

1. *Proposition 36 and Proposition 47*

a. *Proposition 36*

"Under the 'Three Strikes' law as originally enacted in 1994, an individual convicted of any felony offense following two prior convictions for serious or violent felonies was subject to an indeterminate term of life imprisonment with a minimum term of no less than 25 years." (*People v. Conley* (2016) 63 Cal.4th 646, 651; *People v. Johnson* (2015) 61 Cal.4th 674, 680.) On November 6, 2012, the electorate passed Proposition 36. It "amended the Three Strikes law with respect to defendants whose current conviction is for a felony that is neither serious nor violent. In that circumstance, unless an exception applies, the defendant is to receive a second strike sentence of twice the term otherwise provided for the current felony, pursuant to the provisions that apply when a defendant has one prior conviction for a serious or violent felony. [Citations.]" (*People v. Johnson, supra,* at p. 681; *People v. Conley supra,* at p. 651.)

Proposition 36 also enacted section 1170.126, which created a discretionary resentencing procedure by which eligible prisoners already serving third strike sentences may seek resentencing in accordance with the new sentencing rules. (*People v. Johnson, supra,* 61 Cal.4th at p. 682; *People v. Conley, supra,* 63 Cal.4th at p. 653; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1048.) Such an inmate is eligible for resentencing unless an enumerated disqualifying factor applies. An inmate shall be resentenced "unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f); *People v. Johnson, supra,* at p. 682;

People v. Conley, supra, at p. 653.) Section 1170.126 specifies that in exercising its discretion on the dangerousness inquiry, the court may consider the defendant's criminal conviction history, including the type of crimes committed, the extent of injury to the victims, the length of prior prison commitments, and the remoteness of the crimes; the defendant's disciplinary record and record of rehabilitation while incarcerated; and any other evidence the court, in its discretion, determines to be relevant. (§ 1170.126, subd. (g); *People v. Conley, supra,* at p. 653.) Section 1170.126 does not expressly define "unreasonable risk of danger to public safety."

b. *Proposition 47*

On November 4, 2014, after Velasquez filed his Proposition 36 resentencing petition, the voters enacted Proposition 47, the Safe Neighborhoods and Schools Act, which went into effect the following day (Proposition 47). (*People v. Morales* (2016) 63 Cal.4th 399, 404; *People v. Lynall* (2015) 233 Cal.App.4th 1102, 1108.) Proposition 47 amended and enacted various provisions of the Penal and Health and Safety Codes that reduced certain drug and theft offenses to misdemeanors, unless committed by ineligible offenders. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.) These offenses had previously been either felonies or wobblers. (*People v. Rivera, supra,* at p. 1091; *People v. Lynall, supra,* at p. 1108.) Proposition 47 also enacted section 1170.18, which, like section 1170.126, created a procedure whereby an eligible defendant who has suffered a felony conviction of one of the enumerated crimes can petition to have it redesignated as a misdemeanor.

The factors for the court's consideration in making the dangerousness determination enumerated in section 1170.18 are identical to those listed in section 1170.126. Unlike section 1170.126, however, Proposition 47 provides a definition of unreasonable risk of danger to public safety. Subdivision (c) of section 1170.18 states: "As used throughout this Code, 'unreasonable risk of danger to public safety' means an unreasonable risk that the petitioner will commit a new violent felony within the meaning of clause (iv) of subparagraph (C) of paragraph (2) of subdivision (e) of Section 667." Section 667, subdivision (e)(2)(C)(iv) lists serious offenses sometimes referred to as "super strikes": specified sex offenses, any homicide offense or attempted homicide offense defined in sections 187 through 191.5, solicitation to commit murder, assault with a machine gun on a peace officer or firefighter, possession of a weapon of mass destruction, or any serious or violent felony punishable in California by life imprisonment or death. (See *People v. Johnson, supra,* 61 Cal.4th at pp. 681-682.) Thus, under the Proposition 47 definition, a court can find an inmate unsuitable only if resentencing poses an unreasonable risk the inmate will commit a new "super strike" offense, whereas under Proposition 36, no such limitation exists.

2. *The definition of unreasonable risk of danger in section 1170.18 does not retroactively apply to Velasquez's Proposition 36 resentencing petition*

Velasquez contends that because section 1170.18 states that Proposition 47's definition of unreasonable risk of danger to public safety applies "[a]s used throughout this Code," it applies retroactively to Proposition 36 resentencing proceedings. He insists that the Proposition 47 definition governs here because

his appeal of the court's denial of his resentencing petition was pending when Proposition 47 was passed. Since the trial court "did not have the benefit of the clarified definition of an unreasonable risk of danger" when it denied the petition – because Proposition 47 had not yet been enacted – he avers that the matter must be remanded for "reconsideration under the proper standard."

Our Supreme Court is currently considering whether Proposition 47's definition of unreasonable risk of danger to public safety applies on retroactivity or other grounds to resentencing under Proposition 36. (*People v. Chaney* (2014) 231 Cal.App.4th 1391, review granted Feb. 18, 2015, S223676; *People v. Valencia* (2014) 232 Cal.App.4th 514, review granted Feb. 18, 2015, S223825.)

Even were we to assume that Proposition 47's definition of "unreasonable risk of danger to public safety" applies prospectively to Proposition 36 petitions filed after Proposition 47 was enacted, we nonetheless would conclude it does not apply in this case because petitioner's Proposition 36 petition for resentencing was filed and decided before Proposition 47 went into effect.[7] Whether a statute is retroactive turns on the intent of the enacting body, here, the electorate. (*People v. Brown* (2012) 54 Cal.4th 314, 319.) The "default rule" is provided in section 3: " 'No part of [the Penal Code] is retroactive, unless expressly so declared.' " Section 3 "erects a strong presumption of prospective operation" and codifies " 'the time-honored principle . . . that in the absence of an express retroactivity

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[7] In light of our conclusion, we need not and do not reach the question of whether Proposition 47's definition of unreasonable risk of danger to public safety applies here.

provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature . . . must have intended a retroactive application.' " (*People v. Brown, supra,* at pp. 319, 324.) A statute that is ambiguous with respect to retroactive application is construed to be unambiguously prospective. (*Id.* at p. 324.) The text of Proposition 47 is silent on the question of retroactivity. The ballot materials, Legislative Analyst's analysis, and the arguments in favor of and against Proposition 47 are likewise silent. (See Voter Information Guide, Gen. Elec. (Nov. 4, 2014) text of Prop. 47 & analysis by Legis. Analyst, pp. 34-39.) There is therefore "no clear and unavoidable implication" of retroactivity arising from the statutory text or the relevant extrinsic sources. (See generally *People v. Brown, supra,* at p. 320.)

Velasquez contends *In re Estrada* (1965) 63 Cal.2d 740, supports his argument. *Estrada* established an exception to the general rule of prospective application. *Estrada* held: "When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final." (*Id.* at p. 745.) Thus, under the *Estrada* rule a statute that lessens punishment is presumed to apply to all cases not yet final, unless a "saving clause" provides

for prospective application. (*Id.* at pp. 747-748.) *Estrada* is "today properly understood, not as weakening or modifying the default rule of prospective operation codified in section 3, but rather as informing the rule's application in a specific context by articulating the reasonable presumption that a legislative act mitigating the punishment for a particular criminal offense is intended to apply to all nonfinal judgments." (*People v. Brown, supra,* 54 Cal.4th at p. 324 [amendment to section 4019, regarding conduct credits, applied prospectively].)

But *Estrada* does not apply here because applying the Proposition 47 definition of "unreasonable risk of danger to public safety" to petitions for resentencing under Proposition 36 does not reduce the punishment for a particular crime. Instead, retroactive application to Proposition 36 proceedings would change the standard by which dangerousness determinations are made under Proposition 36. Application of a different dangerousness standard does "not represent a judgment about the needs of the criminal law with respect to a particular criminal offense, and thus does not support an analogous inference of retroactive intent." (*People v. Brown, supra,* 54 Cal.4th at p. 325.)[8]

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[8] *Holder v. Superior Court* (1969) 269 Cal.App.2d 314, also cited by Velasquez, does not compel a different result. In *Holder,* several years after the defendant was sentenced to prison the Legislature amended a statute to provide that when a defendant had been sentenced and committed to state prison, the trial court could recall the sentence if deemed warranted by a diagnostic study. (*Id.* at p. 316.) *Holder* concluded the statutory language unambiguously applied to the inmate and "no question of 'retroactivity' in a jurisdictional context" was before the trial court. (*Id.* at p. 318.) In contrast, Proposition 47 contains no

Velasquez makes several arguments in support of his position, none persuasive. He contends that an appellate court must apply the law as it exists when it renders its decision (*Kuykendall v. State Bd. of Equalization* (1994) 22 Cal.App.4th 1194, 1207), and the law as it now exists is that "unreasonable risk of danger to public safety" is defined as in section 1170.18, subdivision (c). But as we have explained, Proposition 47's definition does not apply retroactively. The authorities Velasquez cites do not compel a different conclusion. *Beckman v. Thompson* (1992) 4 Cal.App.4th 481 dealt with "a repeal, not a 'retroactive' application of a new statute." (*Id.* at p. 489.) In *Kuykendall,* which involved a tax refund consumer class action, the court concluded the statutory language and legislative history "clearly indicate[d] the statute was intended to apply to pending cases." (*Kuykendall v. State Bd. of Equalization, supra,* at p. 1211.)

Velasquez further argues that Proposition 47's dangerousness definition constituted a "clarification" of the law, and "[a]n amendment which merely clarifies existing law may be given retroactive effect even without an expression of legislative intent for retroactivity." (*Negrette v. California State Lottery Com.* (1994) 21 Cal.App.4th 1739, 1744; *Re-Open Rambla, Inc. v. Board of Supervisors* (1995) 39 Cal.App.4th 1499, 1510-1511.) But nothing suggests that the electorate intended section 1170.18, subdivision (c) to operate as a clarification of Proposition 36. The Proposition 47 ballot materials told voters

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language indicating the dangerousness definition was intended to apply retroactively. Moreover, *Holder* was decided before our Supreme Court's decision in *People v. Brown, supra,* 54 Cal.4th 314, and to that extent is inapposite.

the initiative applied only to certain offenses. The Legislative Analyst explained: "This measure allows offenders currently serving felony sentences for the above crimes [grand theft, shoplifting, receiving stolen property, writing bad checks, check forgery, and drug possession] to apply to have their felony sentences reduced to misdemeanor sentences." (Voter Information Guide, *supra,* analysis of Prop. 47 by Legis. Analyst, p. 36; *People v. Esparza* (2015) 242 Cal.App.4th 726, 736.) The Voter Information Guide did not mention Proposition 36. (*People v. Esparza, supra,* at p. 737.) The Proposition 47 ballot materials gave no hint that the measure would modify or clarify Proposition 36 or impact felons convicted of offenses other than those expressly listed in Proposition 47. (*Id.* at p. 736.) Under these circumstances, Proposition 47 cannot readily be construed as a "clarification" of Proposition 36. (Cf. *Re-Open Rambla, supra,* at pp. 1504, 1510-1511 [Legislature expressly stated its intent to clarify existing law]; *Negrette, supra,* at p. 1744 [appellate court concluded statutory amendment was a clarification of existing law].)

Velasquez next argues that the timing of Proposition 47's enactment indicates the electorate intended the dangerousness definition to have retroactive application. He points out that, absent a showing of good cause, petitions under Proposition 36 were required to be brought within two years after its effective date, November 7, 2012. Proposition 47 became effective on November 5, 2014, leaving only two days during which a Proposition 36 petitioner could have filed a petition while Proposition 47 was effective. (*People v. Esparza, supra,* 242 Cal.App.4th at p. 737.) Since the statutory language "unreasonable risk of danger to public safety" appears only in

sections 1170.126 and 1170.18, Velasquez argues that prospective application of the definition would render Proposition 47's mandate that the definition applies "throughout this Code" a nullity. *People v. Esparza* came to a different conclusion, reasoning that Proposition 47's use of the word "petitioner" was anomalous if the electorate intended the new definition to apply to resentencing under Proposition 36, presumably because there would be few Proposition 36 petitions at issue after Proposition 47's effective date. (*People v. Esparza, supra,* at p. 737.) We agree that in light of the two-year deadline, it is unreasonable to assume Proposition 47's dangerousness definition was intended to apply to Proposition 36 petitions. As the People argue, it is unlikely the voters intended to change the standard for section 1170.126 petitions "at the very last moment, when nearly all petitions would have been filed and most of them adjudicated."

In a related argument, Velasquez contends that unless Proposition 47's dangerousness definition applies, section 1170.126 is unconstitutionally vague. We disagree. As *People v. Flores* (2014) 227 Cal.App.4th 1070 suggested, "it is debatable whether the vagueness doctrine has application to a superior court judge making a discretionary sentencing decision." (*Id.* at p. 1074.) But assuming it does, Velasquez's contention fails. " 'The constitutional interest implicated in questions of statutory vagueness is that no person be deprived of "life, liberty, or property without due process of law" ' " as assured by the federal and California Constitutions. A statute must be upheld against a vagueness challenge unless its unconstitutionality " 'clearly, positively and unmistakably appears.' " (*People v. Garcia* (2014) 230 Cal.App.4th 763, 768.) Here, the " ' "statute clearly and

precisely delineates its reach in words of common understanding." ' " (*People v. Flores, supra,* at p. 1075.) The term " 'unreasonable risk of danger to public safety' is clear because it can be objectively ascertained by reference to the examples of evidence the trial court may consider in making this determination" set forth in subdivision (g) of section 1170.126. (*People v. Garcia, supra,* at pp. 765-766.) The word "unreasonable" is not impermissibly vague. (*People v. Flores, supra,* at p. 1074; *People v. Garcia, supra,* at p. 769.) " ' "The law is replete with instances in which a person must, at his peril, govern his conduct by such nonmathematical standards as 'reasonable,' 'prudent,' 'necessary and proper,' 'substantial,' and the like. . . . 'There is no formula for the determination of reasonableness.' Yet standards of this kind are not impermissibly vague, provided their meaning can be objectively ascertained by reference to common experiences of mankind." ' " (*People v. Garcia, supra,* at pp. 769-770.) "Surely a superior court judge is capable of exercising discretion, justly applying the public safety exception, and determining whether a lesser sentence would pose an unreasonable risk of harm to the public safety." (*People v. Flores, supra,* at p. 1075.)

Johnson v. United States (2015) 576 U.S. __ [135 S.Ct. 2551], cited by Velasquez, does not compel a different result. *Johnson* concluded a clause in the Armed Career Criminal Act of 1984 (ACCA) was unconstitutionally vague. (*Id.* at p. 2557.) Under that statute, a defendant convicted of being a felon in possession of a firearm faced more severe punishment if he had three or more previous convictions for a violent felony, defined to include "any felony that '*involves conduct that presents a serious potential risk of physical injury to another*.' " (*Id.* at p. 2555,

italics added.) The italicized phrase, denominated the "residual clause," had been interpreted to require a court to employ a framework known as the "categorical approach" to determine whether the offense qualified. (*Id.* at pp. 2556-2557.) A court was required to "picture the kind of conduct that the crime involves in 'the ordinary case,' and to judge whether that abstraction presents a serious potential risk of physical injury." (*Ibid.*) The inquiry was cast, not in terms of how an individual offender might have committed a crime on a particular occasion, but on how the defense was defined. (*Ibid.*) However, the required inquiry went "beyond deciding whether creation of risk [was] an element of the crime" and also went "beyond evaluating the chances that the physical acts that make up the crime [would] injure someone." (*Ibid.*) *Johnson* concluded two features of the residual clause "conspire[d] to make it unconstitutionally vague. In the first place, the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime. It ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements." (*Ibid.*) Second, the residual clause left "uncertainty about how much risk it takes for a crime to qualify as a violent felony. It is one thing to apply an imprecise 'serious potential risk' standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction." (*Id.* at p. 2558.) The court concluded: "[i]ncreasing a defendant's sentence under the [residual] clause denies due process of law." (*Id.* at p. 2557.)

Unlike the ACCA, section 1170.126, subdivision (g) requires that the trial court decide whether a defendant is dangerous based on real-world facts, illustrative examples of which are provided in subdivisions (g)(1), (2), and (3). The trial

court here assessed Velasquez's risk of dangerousness by reference to facts in the record. *Johnson* explained that "[a]s a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct; 'the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree. . . .' " (*Johnson v. United States*, *supra*, 135 S.Ct. at p. 2561.) Moreover, unlike the ACCA, Proposition 36 cannot increase a defendant's sentence. As we explained in *People v. Superior Court (Kaulick)* (2013) 215 Cal.App.4th 1279: "dangerousness is not a factor which enhances the sentence imposed when a defendant is resentenced under the Act; instead, dangerousness is a hurdle which must be crossed in order for a defendant to be resentenced at all. If the court finds that resentencing a prisoner would pose an unreasonable risk of danger, the court does not resentence the prisoner, and the petitioner simply finishes out the term to which he or she was originally sentenced. [¶] The maximum sentence to which Kaulick, and those similarly situated to him, is subject was, and shall always be, the indeterminate life term to which he was originally sentenced." (*Id.* at p. 1303, internal fn. omitted.)

3. *The trial court did not abuse its discretion by denying the petition*

a. *Standard of review*

As noted, under the Reform Act, if the petitioner is statutorily eligible for relief he "shall be resentenced . . . unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (§ 1170.126, subd. (f).) The People have the burden of proving a petitioner's dangerousness by a preponderance of the

evidence. (*People v. Superior Court (Kaulick)*, *supra*, 215 Cal.App.4th at p. 1301; *People v. Flores, supra,* 227 Cal.App.4th at p. 1075-1076; *People v. Esparza, supra,* 242 Cal.App.4th at pp. 740-741.) To meet that burden, the People must present substantial evidence that the petitioner's release currently poses an unreasonable risk of danger to public safety. (*People v. Esparza, supra,* at p. 745.) A trial court may deny resentencing solely on the basis of immutable facts, such as a petitioner's criminal history, only if those facts support the ultimate conclusion that an inmate continues to pose an unreasonable risk. (*Id.* at p. 746.)

We review the trial court's ruling for abuse of discretion. " 'Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion "must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]" ' " (*People v. Williams* (2013) 58 Cal.4th 197, 270-271; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.) A trial court abuses its discretion when the factual findings underlying its decision are unsupported by substantial evidence, or when its decision is based on an incorrect legal standard. (*People v. Knoller* (2007) 41 Cal.4th 139, 156; *People v. Cluff* (2001) 87 Cal.App.4th 991, 998; *People v. Iraheta* (2014) 227 Cal.App.4th 611, 619.) It is the defendant's burden to demonstrate an abuse of discretion. (See *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.)

b. *Proposition 36 did not create a presumption in favor of resentencing*

Before turning to the merits, we consider Velasquez's contention that under section 1170.126, a second strike sentence is the presumptive sentence, and resentencing may be denied only in extraordinary cases. He points out, correctly, that our Supreme Court has held that the Three Strikes law established a sentencing norm and created a strong presumption that any conforming sentence is both rational and proper. (*People v. Carmony* (2004) 33 Cal.4th 367, 378.) Thus, only in extraordinary circumstances can a career criminal be deemed to fall outside the spirit of the Three Strikes law. (*Ibid.*) Velasquez contends that Proposition 36 "changed the 'spirit' of the Three Strikes law" and created the opposite presumption, i.e., that a petitioner whose third strike is neither violent nor serious, and who does not fall within one of the statutory exemptions, should be sentenced as a second strike offender except in extraordinary cases. In support he points to the electorate's stated intent to "restore the original intent of California's Three Strikes law – imposing life sentences for dangerous criminals like rapists, murderers, and child molesters." (Voter Information Guide, Gen. Elec. (Nov. 6, 2012) text of Prop. 36, § 1, p. 105.)[9]

We do not agree that Proposition 36 created a presumption that eligible defendants must be resentenced except in extraordinary cases. *People v. Esparza* is instructive. The court

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9 As Velasquez requests, we take judicial notice of the Voter Information Guide, General Election (Nov. 6, 2012) regarding Proposition 36. (Evid. Code, § 452.) We also take judicial notice of the Proposition 47 ballot materials discussed *ante.*

there reasoned: "We do not agree with defendant that a second strike sentence is the presumptive sentence. [¶] . . . [T]he language of subdivision (f) of section 1170.126 reads that a petitioner who meets the eligibility criteria 'shall be resentenced [as a second strike offender] unless the court, in its discretion, determines that resentencing the [inmate] would pose an unreasonable risk of danger to public safety.' It is not unreasonable to read this text to mean that a court 'shall' impose a second strike sentence unless 'at the discretion of the court' the petitioner's original sentence of 25 years to life appears more appropriate because of an unreasonable risk of danger to the public. However, it is equally reasonable to read the text to mean that a court may select one of the two penalties (a second strike sentence or the original life sentence) in the exercise of its discretion, with no presumption in favor of one or the other." (*People v. Esparza, supra,* 242 Cal.App.4th at p. 738.) *Esparza* reasoned that its conclusion "comports with the plain language of the statute. Had voters intended to permit retention of an indeterminate term only in extraordinary cases, they would have said so in subdivision (f) of section 1170.126, rather than employing language that affords courts broad discretion to find dangerousness. In addition, they would not have afforded the trial court the power to consider any evidence it determined to be relevant to the issue as they did in subdivision (g)(3) of section 1170.126." (*Id.* at p. 739.)

We came to a similar conclusion in *People v. Superior Court (Kaulick), supra,* 215 Cal.App.4th 1279. There, in rejecting an inmate's contention that the prosecution had to prove dangerousness beyond a reasonable doubt, we explained: "Kaulick would interpret the retrospective part of the Act to

mean that every petitioner who meets the eligibility requirements for resentencing is immediately entitled to the recall of his or her sentence, with resentencing to a second strike term the presumptive sentence, and resentencing to the current third strike term available only on proof beyond a reasonable doubt of the additional factor of dangerousness. There is nothing in the statutory language to support this interpretation." (*Id.* at p. 1303.) For the foregoing reasons, we reject Velasquez's contention that resentencing is mandated except in extraordinary cases.

c. *The trial court's denial of the petition was supported by substantial evidence and was not an abuse of discretion*

Turning finally to consideration of the trial court's ruling, we discern no abuse of discretion. The trial court's written ruling makes clear that it carefully considered the evidence presented and applied the proper standards. Psychological testing indicated Velasquez fell within the moderate to high range for risk of reoffense. Dr. Malinek concluded Velasquez presented a moderate risk of violence. It is not an abuse of discretion to conclude the release of a prisoner who poses a moderate to high risk of reoffense poses an unreasonable risk of danger to public safety. Malinek also opined that it was uncertain how Velasquez would function in the community. It was undisputed that Velasquez's prior criminality was directly related to his heroin addiction, but he had never participated in substance abuse treatment while incarcerated. Although such programs were apparently largely unavailable to Velasquez due to his validation as a Mexican Mafia associate and his own prison misconduct, the fact remains that his substance abuse had never been treated. Further, his post-release plans made no concrete provision for

substance abuse treatment or relapse avoidance. Velasquez's prison disciplinary history was documented by the evidence. The trial court's conclusion that, viewed in totality, the evidence indicated an unreasonable risk of danger to public safety was neither arbitrary nor capricious, and its decision was supported by substantial evidence.[10]

The record does not suggest the trial court placed undue importance on Velasquez's prior criminality and prison disciplinary history, as Velasquez asserts. The court expressly

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[10] Relying on *Board of Pardons v. Allen* (1987) 482 U.S. 369 and *Greenholtz v. Nebraska Penal Inmates* (1979) 442 U.S. 1, Velasquez argues that he has a "due process liberty interest" in resentencing under both the federal and California Constitutions. He contends that section 1170.126 contains "mandatory language" giving rise to such an interest, and the denial of a petition deprives an inmate of an earlier release date. Therefore, he argues, he was entitled to notice of the resentencing proceedings, an opportunity to be heard, and a statement of the reasons for the denial. Further, he insists that due process requires that before a resentencing petition may be denied, there must be a "rational nexus between the inmate's record and the court's conclusion of dangerousness" based on the court's balancing all the factors in the record. But, assuming for the sake of argument that section 1170.126's language gives rise to such a liberty interest – a conclusion with which we do not necessarily agree – Velasquez fails to demonstrate that he has been deprived of due process here. The trial court conducted a noticed hearing at which it took evidence. Velasquez was present and represented by counsel. He had the opportunity to, and did, present evidence. The trial court provided a 13-page written ruling detailing its conclusions, which made clear that the court did, in fact, consider and balance the totality of the evidence and find a "nexus" between Velasquez's record and dangerousness.

acknowledged that such immutable factors cannot, standing alone, support a dangerousness finding. Its decision was based on the conclusion that the totality of the circumstances, including the psychological testing results, lack of substance abuse treatment, and Velasquez's weak post-release plans, demonstrated dangerousness. Contrary to Velasquez's argument, the trial court did not improperly shift to him the burden of proving the adequacy of his parole plans and the "sincerity of his sobriety." The People presented ample evidence that Velasquez's criminality was due to his drug addiction. Based on this, the trial court properly could conclude the absence of substance abuse treatment was problematic. Velasquez's other arguments – e.g., that he does not suffer from psychological problems, has no record of violence in prison, has overcome his drug addiction, has joined AA and NA, and will continue participation in these programs upon release – are merely requests that we reweigh the evidence and improperly substitute our judgment for that of the trial court. (See, e.g., *People v. Jackson* (2014) 58 Cal.4th 724, 749.)

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

EDMON, P. J.

STRATTON, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.